THE YALE LAW JOURNAL

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Legal Scholarship for Judges

ABSTRACT. This Feature examines the role of legal scholarship in judicial decision making. It first provides a historical snapshot of U.S. legal scholarship, noting that the advent of legal realism and other academic schools of thought may have contributed to a gap between legal scholarship and judicial practice. The Feature then conducts an empirical survey of recent citations to legal scholarship on the Seventh Circuit and concludes that most citations were on points of legal doctrine rather than broad legal theory. While legal scholarship could well serve purposes other than influencing judges—such as introducing new ideas, helping to shift norms, and subtly affecting the development of the law—the Feature draws attention to the disconnect between the bulk of legal scholarship and the judicial decision-making process..

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INTRODUCTION

Long before Chief Justice John G. Roberts, Jr. startled the legal academy in 2011 by characterizing legal scholarship as something concerned with "the influence of Immanuel Kant on evidentiary approaches in eighteenth century Bulgaria or something,"[1] I had worried from time to time about the focus, the utility, and the influence of the outpouring of written work that emanates each year from America's two hundred plus law schools. Legal scholarship, however, is not a monolith: it is produced by a great variety of writers, it is addressed to a number of distinct audiences, and it reflects a wide range of goals. I do not want to live in a world where there is no place for the scholar who specializes in Immanuel Kant, but at the same time, that scholar must recognize that a busy federal judge or Justice is quite unlikely to read a word she has written. Whether the latter fact is regrettable is one of the points that this Feature covers. Before doing so, however, it takes a broader look at the trends in legal scholarship over the twentieth and early twenty-first centuries. It then takes a more personal turn to address the ways in which I seem to be using legal scholarship. In short, there are some types of articles or books that I systematically push to the back of my desk and eventually discard; others I skim quickly to see if the author is making an interesting point; and a small number I read carefully, either for my own edification or to cite in an opinion.

In order to set the stage, I begin with a brief reminder of the two threads that make up our story: one concerns legal scholarship in the United States, beginning for convenience in the nineteenth century, and the other concerns legal education and the bar. This story shows that, in contrast to the general experience in Europe, we have always had at least two, and maybe three, parallel legal professions in the United States: the legal academy, the practitioners, and the judiciary. From the outside, these may seem to be all of a piece, but for insiders, there are sharp differences among them. Consider, for instance, the fact that one of the worst things a law school hiring committee might say about a candidate for a tenure-track position is that her written work "merely" reviews "what the law is" and is directed to a practitioner audience. By the same token, one withering criticism a young associate might receive from a senior partner about a draft memorandum or brief is that it is "too academic." There is a rift here, to be sure, and most state and federal judges probably fall on the practitioner side of that rift. That rift may account, in no small part, for the re-

1. Chief Justice John G. Roberts, Jr., *A Conversation with John Roberts*, C-SPAN (June 25, 2011), http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts [http://perma.cc/PL96-DZYG].

ception that the work of the legal academy receives among judges and practitioners.

After this quick look at the distinctive path legal scholarship has taken, I will jump forward to a look at what the Seventh Circuit has been doing with legal scholarship over the last several years. Others have conducted similar studies,[2] and so mine is intended only to add to the body of work that has already been done. There is one caveat, however, that must be acknowledged, even if it is hard to know what to do with it. Scholarship plays both a visible and an invisible role in judicial decision making. The visible role of scholarship is relatively easy to study: how many articles are cited in judicial opinions, and what type of article seems to have the greatest impact? The invisible role of scholarship—the ways in which scholarship introduces new ideas, helps to shift norms, and subtly affects the development of the law—is more difficult if not impossible to evaluate. The warning here relates to the way in which judicial opinions are produced in today's world (which for convenience we may date from the mid-1960s): who is writing the opinion drafts, who is including the citation to the article, and who actually read the article? If you are thinking that it might not have been the judge, you are correct. Law clerks write a very large number of first drafts, and they are the ones who propose citations to support the result in the opinion. Citations to the Constitution, to statutes, and to regulations are easy for the judge to check; so are citations to judicial opinions. But some citations to articles may appear without much judicial oversight (though this is certainly not inevitable—some judges furnish their own citations, and many, if not most, judges who do not write their own first drafts nonetheless review carefully whatever the law clerk has submitted). I have no proposal that would help scholars to distinguish between "real" citations to scholarship (that is, citations to articles that the judge herself read and found useful for resolving the problem at hand) and "filler" citations to scholarship. Nevertheless, the difference is there, and it means that the data should be treated with some caution.

2. *See, e.g.*, Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. 995 (2012); David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345 (2011).

I. AN HISTORICAL SNAPSHOT OF U.S. LEGAL SCHOLARSHIP

A. Academic Legal Scholarship

The idea of a body of scholarship devoted to law came slowly to the United States. During the Colonial period, the Revolutionary period, and the early years under initially the Articles of Confederation and later the Constitution, law per se was not an academic subject. When Thomas Jefferson decided to read law, he studied the leading legal treatise of the time, Sir Edward Coke's *Institutes,* a four-volume (and reportedly tedious) treatise, along with Coke's *Reports* of leading cases.[3] He read these materials, along with Matthew Bacon's *New Abridgement of the Law,* under the tutelage of George Wythe,[4] and he was then ready to go to work. Such colleges and universities as there were during that period in the United States offered neither undergraduate nor graduate degrees in law. Not until 1793 did William & Mary College grant its first Bachelor of Law degree (an L.B.),[5] and not until 1817 did Harvard create the first systematic university-based law program,[6] under which the degree of L.L.B. was awarded.[7]

Academic law as an independent subject was slow to catch on. Indeed, throughout the nineteenth century there was a debate that would sound familiar to modern ears: should universities offer essentially a vocational degree in law, alongside their more elevated subjects such as philosophy, mathematics, religion, and the study of ancient languages, or should universities treat law as part of liberal, philosophic, or scientific studies?[8] The prevailing view appears to have been the latter. As of 1900, most states did not require a university education to become a lawyer, and most practitioners had not attended either col-

3. *See* R.B. BERNSTEIN, THOMAS JEFFERSON 5-6 (2003); *see also* GRIFFIN B. BELL, *Jefferson the Lawyer: The Notion of Natural Rights, in* FOOTNOTES TO HISTORY: A PRIMER ON THE AMERICAN POLITICAL CHARACTER 28-29 (John P. Cole ed., 2008). Bell reports that Jefferson later read Blackstone's *Commentaries,* but that this work (which played such a major role for countless American lawyers) had not yet appeared when he was first learning the law. *Id.*

4. *See* Mark T. Flahive, *The Origins of the American Law School,* 64 A.B.A. J. 1868, 1876 (1978).

5. *See Commemoration: William H. Cabell,* 34 WM. & MARY L. REV. 573, 573 (1993).

6. *See* HARVARD LAW SCH. ASS'N, THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817–1917, at 3–4 (1918).

7. Michael E. Gehringer, *Questions and Answers,* 72 LAW LIBR. J. 152, 154 (1979).

8. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 472 (3d ed. 2005) ("In the history of legal education, two paired sets of principles were constantly in battle. A principle of vocational training struggled against a principle of scientific training. At the same time, a principle of integration with general liberal education struggled against a principle of segregation.").

lege or law school.[9] It was, however, common for states to require an apprenticeship with a member of the bar as a condition to admission.[10] Old practices died slowly: Justice Robert H. Jackson, who sat on the U.S. Supreme Court from July 1941 through August 1954, was the last-appointed Justice never to have graduated from law school.[11] Even today, a handful of states permit people who have not completed law school to sit for the bar, although this is quite unusual and not likely to make a comeback.[12]

Change in legal education, however, was on the way. In 1870, Christopher Columbus Langdell was appointed to be dean of the then-three-person faculty of the Harvard Law School.[13] That same year, he inaugurated the case method of teaching, and one is tempted to say that the rest has been history. Langdell, however, was distinctive less for his theories of law than for his pedagogy. Like most professors in the nineteenth century, he believed that there were certain rules of law, and that these rules could and should be learned by students. He merely thought that law, like other "sciences," was better taught through the use of primary materials than through lectures.

The real radical to come along was Oliver Wendell Holmes, Jr., who published *The Common Law* in 1881 and launched the movement that later became known as Legal Realism. Holmes famously began his book with the observation that "[t]he life of the law has not been logic: it has been experience."[14] He meant not just that the life of the law was not logic; it also was not science, or God-given natural rules, or reason. This became clear when, in his lecture *The Path of the Law*, he argued that there is no basis in reason, or science, or other external sources, for deciding what the proper rule of law is for any given situation.[15] Try as one might, it is impossible to delete the element of human judgment and reasoning from the articulation of legal rules.

Writing as he did during a time when science was challenging the most fundamental assumptions, Holmes may simply have been to law what other

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9. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 24 (1983) ("The vast majority of the legal profession until the turn of the century still experienced only on-the-job legal education.").

10. *Id.* at 25.

11. TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 327 (2001).

12. *See* Sean Patrick Farrell, *The Lawyer's Apprentice: How To Learn the Law Without Law School*, N.Y. TIMES, July 30, 2014, http://www.nytimes.com/2014/08/03/education/edlife/how-to-learn-the-law-without-law-school.html [http://perma.cc/KXX8-7E32].

13. *See* Bruce A. Kimball, *Christopher Langdell: The Case of an 'Abomination' in Teaching Practice*, THOUGHT & ACTION, Summer 2004, at 23, 27.

14. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (John Harvard Library 2009) (1881).

15. *See generally* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

giants were to other fields.[16] Charles Darwin had published *The Origin of Species* in 1859;[17] Louis Pasteur disproved the theory of spontaneous generation in 1862;[18] in the last decades of the nineteenth century, Thomas Edison revolutionized electric light, sound recordings, and motion pictures;[19] Guglielmo Marconi invented wireless telegraphy in the 1890s;[20] and at the same time Marie and Pierre Curie discovered and named radioactivity.[21] It would have been surprising if law had not in some manner reflected the same creativity, innovativeness, and humanistic spirit.

For law, however, there were institutional consequences implicit in the idea that law is a human creation and that judges in particular have a role in its development. The Framers of the United States Constitution had adopted a government in which basic powers were separated, subject to carefully drawn checks and balances. The simplistic theory has the legislative branch creating the laws, the executive branch enforcing the laws, and the judicial branch applying the laws to cases properly brought before it. But what happens when the legislative branch has consciously delegated authority to promulgate specific rules and regulations under the umbrella of a general statute? What is a judge to do when the law is not clear and some blanks remain? In a world where law was pre-existing and determinate, the judge's job was to search through the authorities until he found the answer. But if research is inherently incapable of furnishing a definitive answer, to what should a judge turn?

One answer was furnished by the Legal Realists, who took the position that law is not independent of public policy or social interest. To the contrary, they said, law reflects the policy preferences of society as a whole, and of judges in particular.[22] Taken to its extreme, Legal Realism postulates that judges do not

16. *See generally* LOUIS MENAND, THE METAPHYSICAL CLUB (2001) (discussing American intellectual history after the Civil War, focusing in particular on Oliver Wendell Holmes, William James, Charles S. Peirce, and John Dewey, and touching on scientific developments of the time).

17. CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE (Jim Endersby ed., Cambridge Univ. Press, 2009) (1859).

18. *See* Nils Roll-Hansen, *Experimental Method and Spontaneous Generation: The Controversy Between Pasteur and Pouchet, 1859-64*, 34 J. HIST. MED. & ALLIED SCI. 273, 286-87 (1979).

19. *See* JILL JONNES, EMPIRES OF LIGHT: EDISON, TESLA, WESTINGHOUSE, AND THE RACE TO ELECTRIFY THE WORLD (2004).

20. *See* SUNGOOK HONG, WIRELESS: FROM MARCONI'S BLACK-BOX TO THE AUDION 1 (2001).

21. *See* Nancy Fröman, *Marie and Pierre Curie and the Discovery of Polonium and Radium*, NOBELPRIZE.ORG (Dec. 1 1996), http://www.nobelprize.org/nobel_prizes/themes/physics/curie [http://perma.cc/7NXR-VLZ4].

22. *See, e.g.*, Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

decide cases based on pre-existing laws, but instead inevitably inject their own policy views into each matter before them.[23] If the Legal Realists were accurately describing the judicial process, then their school calls into question the assumption of the Framers that it is possible to separate the legislative and judicial functions. It also throws a shadow over the idea, famously articulated by Chief Justice John Marshall, that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[24] Why should unelected judges with tenure of office "during good behavior" have this power, if they are not tethered to law, understood as a set of rules that democratic institutions have specified in advance? The Realists had no good answer to this question. That is probably because it is not a very good question. By assuming away all of the complexity of both the lawmaking and the law-application process, the Realists had created a world in which the rule of law itself was impossible—a world where judges could and would exercise arbitrary power.

Predictably, other schools of thought came along, some of which challenged the Realists and others of which pushed their thinking further. Among the former is the Legal Process School of the 1950s and 1960s, which tried to find a middle ground between the legal formalism of the pre-Holmes period and the nihilism of Legal Realism. Its adherents included scholars such as Herbert Wechsler, Henry Hart, Albert Sacks, Lon Fuller, John Hart Ely, and Alexander Bickel, all of whom emphasized the constraints on courts imposed by the institutional structure within which they operate.[25] The rule of law could be respected in such a setting, despite the rejection of the notion of "ultimate" truth in natural law, because the governed have notice of the rules under which they must live, an opportunity to contest them in a fair hearing, and meaningful remedies.[26] Finally, both legal process advocates and later scholars, including Ronald Dworkin, worked to articulate a way in which law would operate neutrally for and against all persons.[27]

Legal pragmatism is another approach that attempts to connect law with the real world in a way that constrains judicial choice while at the same time acknowledging the inevitability of case-by-case judgment. Its most prominent proponent is Judge Richard A. Posner, a judge of the Court of Appeals for the

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23. *See, e.g.*, *id.* at 1237 (noting that realists exhibit "a distrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions").

24. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

25. *See generally* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 (1993).

26. *Id.* at 608-09, 620-28.

27. *See* Ronald Dworkin, *Liberalism and Justice*, *in* RONALD DWORKIN, A MATTER OF PRINCIPLE 192 (1985); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

Seventh Circuit and a leading public intellectual.[28] Judge Posner's version of legal pragmatism grows out of his lifelong study of law and economics, but it ranges more broadly than many might think. Law and Society is another post-Realist philosophy that seeks to find room for legitimate judicial action notwithstanding the lack of clear answers in positive law.[29]

On the other side of the coin, Legal Realism spawned the family of Critical Studies schools, including Critical Legal Studies, Critical Race Theory, Critical Gender Theory, and others. It would be impossible to describe each of these approaches fully, but in brief they reject the idea that legal doctrine has any content independent of the social realities against which it operates (including, for example, liberal theory, racial realities, and gendered expectations).[30] Unless one is willing, in a leap of faith, to delegate decision-making power to random persons with the title "judge," it is hard to see where the judiciary fits into these schools of thought or what a judge persuaded by something in the literature is to do. This may be one reason why references to these bodies of literature are vanishingly scarce in judicial opinions.

Scholarship about the way judges think and what influences their decisions has, until recently, developed without much input from the judges themselves. Perhaps this is why some of the theories advanced—Realism, Critical Studies—seem incompatible with principled judicial decision making, if principled judicial decision making requires adherence to democratically legitimate substantive laws. This left judges who wanted or needed to consult materials beyond earlier cases and statutory or constitutional texts with a dearth of available sources. As the next Part shows, other (primarily non-academic) organizations began to fill that vacuum.

B. Another Kind of Legal Scholarship

At the same time as the legal academy was wrestling with these various schools of thought, another source of legal scholarship was developing. It is epitomized by the American Law Institute (ALI), "founded in 1923 following a study conducted by a group of prominent American judges, lawyers, and

28. *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); Richard A. Posner, *What Has Pragmatism To Offer Law?*, 63 S. CAL. L. REV. 1653 (1990); Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 688 (2003) (reviewing POSNER, *supra*) ("For well over a decade, Posner has been the leading proponent of legal pragmatism.").

29. *See generally* Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986).

30. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

teachers known as the 'Committee on the Establishment of a Permanent Organization for the Improvement of the Law.'"[31] Among the ALI's founding members were Chief Justice and former President William Howard Taft, future Chief Justice Charles Evans Hughes, and former Secretary of State Elihu Root; Judges Benjamin Cardozo and Learned Hand were among its early leaders.[32] The ALI's stated goal was to "address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was."[33] And indeed that is what the ALI has done through its now ninety-two-year history. Note the contrast between the notion that it is possible to state "what the law is" and the intellectual movements that were taking place during the 1920s and 1930s. The membership of the ALI draws from all three branches of the legal profession: bench, bar, and academy, but its Restatements of the Law and Principles of the Law are primarily addressed to courts. There is now a considerable body of work published under the ALI's auspices, but it is a different sort of legal scholarship than the articles and books that are typically written by legal academics. The U.S. Supreme Court justices, their state court counterparts, and practicing lawyers alike look to the Restatements for guidance when a new legal problem comes up, and the Restatements are cited regularly in judicial opinions.[34]

Another source of legal commentary comes from the many bar associations and providers of continuing legal education around the country. Some sponsor regular journals, such as the American Bar Association Section of Litigation's journal *Litigation*, or the Section of Antitrust Law's *Antitrust Law Journal*, while others publish whenever they sponsor a program. These publications can be very useful to busy lawyers, but they are not generally recognized in the legal academy as "real" legal scholarship, and they are not what I am discussing in this Feature.

One might ask, as Chief Justice Roberts did, whether the output from the academy has become so removed from the legal issues our society faces that it has lost its particular relevance to the legal profession. (I say "particular" relevance in recognition of the fact that good philosophy, or social science, or literature has general relevance and importance. Even so, such general works do not aspire to—and normally do not—suggest a good way to navigate the com-

31. *ALI Overview: Creation*, AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=about.creation [http://perma.cc/DGT2-TA4A].

32. *Id.*

33. *Id.*

34. *See, e.g.*, Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 249 (2007) ("Courts rely on Restatements in the same manner as treatises, as impartial, scholarly reviews and criticisms of the law as it is or, in some cases, as it should be. In that sense, they can be an important influence on state court decisions.").

plexities of, for example, the Clean Air Act, the Cruel and Unusual Punishment Clause of the Eighth Amendment, or complex bankruptcy preferences.) There are reasons to encourage law schools and legal scholars to return to the fold and to realize that law itself is eminently worthy of serious study. Good work does not need to be of the "Law and" variety, in the words of the late professor Arthur Leff,[35] nor is it the case that people are not qualified to join the legal academy unless they have not only a law degree but also a Ph.D. in another area.[36] The ALI has launched a project to encourage serious *legal* research through its Young Scholars Medal.[37] Law schools would do well to find more ways to encourage both theoretical and empirical work in law—work that would then be published in mainstream law journals and stand some chance of helping all participants in the system understand better what is on the books, what consequences (intended or unintended) the law in question has had, and what improvements might be made.

C. Legal Scholarship Today

Before turning to a look at the legal scholarship that is presently making its way into Seventh Circuit opinions, I will close this part of the Feature with a few general questions and some general answers. The questions are these:

- Who is writing?
- Who is publishing?
- Who is the intended audience?
- How do written works reach that audience?

Here are my answers:

- Everyone is writing—lawyers, legal academics, other academics, journalists, and bloggers.

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35. Arthur Allen Leff, *Law and*, 87 YALE L.J. 989 (1978).

36. *Cf.* Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUD. 1, 2 & n.4 (2014) (stating that applicants for tenure track law professor jobs increasingly have earned a masters or doctorate in another field).

37. *See Young Scholars Medal*, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=about.youngscholars [http://perma.cc/6Y9X-NHHG].

- Everyone is publishing—from the student-edited law reviews,[38] to the (small number of) peer-reviewed journals, to bar association outlets, to the blog established just yesterday.

- From one perspective, there are no restrictions on the intended audience. Nevertheless, as a practical matter there is a hierarchy: first, the peers of the writer (scholars write for other scholars, practitioners write for other practitioners, and journalists write for the public); second, decision-makers; and third, the legal profession writ large.

- Written works now reach audiences largely through computerized databases on the Internet. This has had the effect of diluting the influence of the major law reviews, which used to have a shelf-space advantage in law libraries. For the small number of peer-reviewed journals, readers have some assurance of quality. Otherwise readers are on their own, either with a student-edited journal or something more entrepreneurial.

II. SCHOLARSHIP IN ACTION

This overview shows who is writing and who the authors *hope* are reading their output. As I indicated at the outset, however, more often than not those hopes are not realized. In order to test that hypothesis, I took a look at the "published" (meaning precedential) output of the Seventh Circuit from August 2013 to August 2014. I recognize that this approach may miss certain ways in which scholarship affects judges. For instance, judges might be reading articles that they do not cite (just as they may spot interesting articles in the newspaper or on their favorite blog). My hypothesis, however, is that the most influential academic works will show up in opinions. In any event, tracking the invisible ways in which scholarship affects outcomes without a good empirical survey of the judges is quite difficult. In days gone by, one might have looked at each judge's chambers library to see which law journals the judge regularly reviewed. Today, largely for budgetary reasons, printed copies of law reviews have vanished from chambers' libraries and the judges rely exclusively on electronic databases. In addition, heavy dockets at both the state and federal level

38. For criticism of the dependence of the legal academy on this outlet since the sharp reduction in doctrinal articles, see Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1132 (1995).

leave little time for "personal-improvement" reading. This can be unfortunate, when something of real interest comes along and the judge must settle for skimming it. But that is reality. With those thoughts in mind, I turn now to the results of my survey.

According to Westlaw, the Seventh Circuit issued 1,123 opinions between August 1, 2013 (the earliest date on my list) and August 14, 2014 (the latest date I have); of those, 669 were "reported" or "published," and 454 were "unreported" or nonprecedential.[39] Over that period, only seventy-six reported cases, or 11.4%, included one or more references to legal scholarship. (It is unlikely that the percentage would do anything but go down if we searched the unreported decisions for citations to scholarship.) The case with the greatest number of references to scholarly articles was *Korte v. Sebelius*, which dealt with such contentious questions as whether corporations have standing to attack the contraception mandate in the Affordable Care Act, whether the mandate imposed a substantial burden on religious exercise, and whether the government's showing was sufficient to demonstrate the validity of the mandate.[40] Perhaps, one might think, scholarship is especially useful when cutting-edge, politically divisive issues are presented in the case. More broadly, it is helpful to break down the types of scholarship that appear in opinions.

Our own review of the articles cited in the opinions suggested seven different types of legal scholarship that appeared. I present them here in order of frequency: (1) doctrinal works that focus on a narrow issue (forty-two cases, with eighty citations); (2) doctrinal works that survey an area (twenty-four cases, with forty-two citations); (3) theoretical or interdisciplinary works (eighteen cases, with twenty-six citations); (4) articles discussing legislative history or those that include a critique of the law or a proposal for change (seven cases, with nine citations); (5) articles presenting empirical research (six cases, six citations); (6) articles discussing recent decisions of the U.S. Supreme Court (five cases, six citations); and (7) articles offering a comparative legal perspective (three cases, four citations). These numbers are telling: judges (or their law clerks) refer to articles that are most pertinent to the problem at hand. More ambitious pieces – the theoretical, the empirical, or the comparative – are used with greater caution.

That is not because theory, data from the world, and perspective on how others do things are irrelevant to the law. But, particularly for first-instance

39. Westlaw has a standalone Seventh Circuit database, which is what we used to obtain these numbers. It automatically excludes the Northern District of Illinois, the Supreme Court, and the bankruptcy court. An Excel sheet that lists the case, citation, proposition, and article cited for the period covered appears as the Appendix.

40. 735 F.3d 654 (7th Cir. 2013).

and intermediate-level courts, such materials must be used with caution, within the boundaries that the Constitution, legislation, and higher courts have delineated. Law does matter, and it imposes constraints that genuinely bind judges. No matter how well-reasoned a theoretical piece may be, or how compelling the empirical evidence, or how wise another country's solution may appear, it is the task of U.S. judges to apply and interpret U.S. law. A judge might comment on a rule whose time has come and gone, but the lower court judge must nonetheless apply it.[41] In some instances, however, the law invites judges to consult empirical evidence. How, for instance, is a judge to decide whether an advertising campaign or a debt-collection letter is misleading? Empirical evidence might not be necessary, but surely it is relevant to this type of question. Many U.S. laws also advert to foreign law: obvious examples include the foreign tax credit,[42] but the reach of foreign law is also central to the adjudication of a motion to dismiss on forum non conveniens grounds,[43] or a motion to stay proceedings in favor of a first-filed foreign proceeding that covers the same ground, or a suit to obtain information for use in a foreign legal tribunal.[44]

The overwhelming majority of the citations, however, are more immediately utilitarian. Looking now at citations rather than opinions that include a reference to scholarship, we see that there were 173 citations over the course of the year in question, and that 122 of those (approximately 70%) were either "doctrinal/survey" references or "doctrinal/narrow issue" references. Considering the volume of legal scholarship that pours out of America's more than 200 law schools each year, most of which have several student-edited journals, this is a poor showing. Not only does this informal survey suggest that the results of legal scholarship seldom appear in judicial opinions, it also suggests that the articles that are cited are those that fall at the lower end of the prestige scale that is tacitly accepted in elite law schools. Judges may be reading the more ambitious articles in their spare time, scarce though that often is, but they are

41. *See, e.g.*, Khan v. State Oil Co., 93 F.3d 1358 (7th Cir. 1996) (discussing the per se rule against maximum price-fixing). The court was highly critical of the rule, but it stated openly that only the Supreme Court could change things. And indeed, the Supreme Court granted certiorari in that very case and overruled the old rule. *See* State Oil Co. v. Khan, 522 U.S. 3 (1997).

42. *See, e.g.*, United States v. Goodyear Tire & Rubber Co., 493 U.S. 132 (1989) (deciding that the issue of accumulated profits had to be assessed under U.S. principles, not British principles, in the application of the foreign tax credit to British earnings, but considering both bodies of law).

43. *See, e.g.*, Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422 (2007).

44. *See, e.g.*, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (construing 28 U.S.C. § 1782 (2012) as it was used to collect information for a proceeding before the Directorate-General for Competition of the European Union).

turning for help in deciding cases to the doctrinal work that emerges from the legal academy and that groups like the ALI and the bar produce, as our review of citations revealed.

The final insight that comes from this snapshot of the Seventh Circuit may allow this Feature to end on a more optimistic note. Judges vary greatly in their willingness to include references to scholarship in their opinions. Looking at the cases gathered in the Appendix and counting both majority opinions and separate opinions, we see that Judge Posner referred to scholarly articles in thirty-one different proceedings – by far the most of any judge on the court. Judge Hamilton came in second, with references in ten opinions. I was third, with nine; Judges Flaum, Easterbrook, Rovner, and Sykes each had five; Judges Manion and Tinder had four, and Judge Kanne one. These numbers suggest that even when a panel of three (or more) judges agrees on a particular result, the reasons for each judge's decision will vary, and the types of materials that individual judges discuss in their opinions are not uniform.

It would be a mistake, however, to make too much of a single year's docket. Many cases decided by the federal courts of appeals involve straightforward applications of the law, and there is no need to belabor the analysis with gratuitous citations. If in a given year a particular judge does not happen to be assigned to a panel with the kind of blockbuster case that invites references to legal scholarship, then the judge will have no occasion to consult the law reviews, or, for that matter, the ratification debates that led to the adoption of the Constitution, or an eighteenth century dictionary.

For purposes of this discussion, as well as more generally, it is also vital to bear in mind the distinct roles of trial court judges, intermediate appellate judges, and judges or justices on courts of last resort.[45] The role of legal scholarship and its potential utility are greater for courts of last resort, whether state supreme courts or the United States Supreme Court.[46] It is no accident that many state supreme courts have looked to the ALI's Restatements of the Law when they consider new questions of contract, tort, agency, property, or the like. (They are not as likely to adopt some of the more abstract musings of legal scholars, but that can hardly surprise the writers.) At its best, legal scholarship rises above the details of any particular field of law and improves understanding of our legal system as a whole. It can reveal similarities that have been hidden by the details of old doctrines or cases; it can sweep away irrelevancies and

45. *See* Diane P. Wood, *When To Hold, When To Fold, and When To Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445 (2012).

46. *See* Petherbridge & Schwartz, *supra* note 2; *cf.* Schwartz & Petherbridge, *supra* note 2 (finding a "marked" increase in the use of legal scholarship at the court of appeals level over the last fifty-nine years).

provide a clear rule of decision that benefits the community as a whole and the lower court judges who must apply the law; it can reveal unintended inefficiencies or impositions that are inconsistent with fundamental constitutional principles. Perhaps these advances inspire legislators to pass better laws; perhaps they inspire Supreme Court Justices to look through old myths, like "separate but equal," and realize that there is just one principle of equality; and perhaps they allow other judges to explain their reasoning in a way that is clear, consistent with binding rules, and compelling. Those are some of the goals to which legal scholarship should aspire.

CONCLUSION

To the extent that legal scholarship can spark a new way of thinking about law, and by fanning the flame become influential, it is worthwhile. But most of those sparks, unfortunately, do not fall on judges. Professors in the legal academy write for their peers; they test hypotheses in workshops, work-in-progress luncheons, exchange of papers for comment, and their experiences as teachers in the classroom. Papers are commonly posted online before they take their final form as articles. The content of those papers reaches some judges directly, at least some of the time, but more often the influence is indirect – the invisible role of scholarship that I discussed at the outset of this Feature. The judge may remember one or more particularly influential professors from her own law school experience and find those professors' approach to the law persuasive. Or the judge, recalling days as a practicing lawyer, may understand the need for imaginative thinking when a client's problem seems like a square peg being hammered into a round hole, yet the lawyer (and later the judge) is persuaded that the client should prevail. When legal scholarship subtly influences the way that a brief is written, and the writer has taken care to respect the judge's institutional constraints, that scholarship may be very influential indeed. Judges are also exposed on a daily basis to whatever scholarship contributed to the education of their law clerks. Finally, if other judges are like me, they receive a constant flow of article offprints and books from academics around the country who are only too pleased to share their latest work product. I do not read every word of every article or book that I receive, but I do take a look at all of them to see what is being discussed, how well the piece is written, and whether it pertains either generally to what I do as an appellate judge or particularly to an area that interests me.

Legal scholarship would go out of business if it were produced exclusively for judges, but fortunately for those in the scholarship business, the audience is not so limited. Even though a great deal of what is produced is too abstract to be useful (although I have a quibble with the Chief Justice's criticism, since Bulgaria did not exist as an independent state between the fourteenth and late

nineteenth centuries),[47] one can never predict where basic research will go, in law just as in the hard sciences. Judges are the indirect beneficiaries of that basic thinking, and they are the direct beneficiaries of legal writing that is more focused on either substantive doctrine or legal process. So write on, and we will read what we can.

47. *See* R.J. CRAMPTON, A CONCISE HISTORY OF BULGARIA xv-xvi (2d ed. 2005).

APPENDIX: LEGAL SCHOLARSHIP IN RECENT SEVENTH CIRCUIT DECISIONS

Case	*Judge*	*Proposition*	*Article*
520 S. Michigan Ave. Assocs. Ltd. v. Unite Here Local 1, 760 F.3d 708 (7th Cir. 2014)	Tinder	Doctrinal/Survey	Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002)
Archdiocese of Milwaukee v. Doe, 743 F.3d 1101 (7th Cir. 2014)	Sykes	Doctrinal/Survey	Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000)
Bitler Inv. Venture II v. Marathon Petrol. Co., 741 F.3d 832 (7th Cir. 2014)	Posner	Doctrinal/ Narrow Issue	Scott M. Tyler, Note, *No (Easy) Way Out: "Liquidating" Stipulated Damages for Contractor Delay in Public Construction Contracts*, 44 DUKE L.J. 357 (1994)
	Posner	Theory/ Interdisciplinary	Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653 (2006)
Bryn Mawr Care, Inc. v. Sebelius, 749 F.3d 592 (7th Cir. 2014)	Manion	Legislative History/Critique	Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999)
Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Lewis, 745 F.3d 283 (7th Cir. 2014)	Posner	Doctrinal/ Narrow Issue	Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435 (2009)
Chasenksy v. Walker, 740 F.3d 1088 (7th Cir. 2014)	Manion	Doctrinal/ Narrow Issue	Saikrishna Bangalore Prakash, *The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 NOTRE DAME L. REV. 199 (2013)
Coyomani-Cielo v. Holder, 758	Flaum	Recent Supreme Court	Note, *"How Clear is Clear" in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687 (2005)

F.3d 908 (7th Cir. 2014)			
Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F.3d 869 (7th Cir. 2014)	Easterbrook	Doctrinal/Survey	Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992)
	Easterbrook	Doctrinal/Survey	Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W. VA. L. REV. 343 (2007)
Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014)	Posner	Doctrinal/ Narrow Issue	David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998)
	Posner	Doctrinal/ Narrow Issue	Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979)
	Posner	Doctrinal/ Narrow Issue	Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013)
	Posner	Theory/ Interdisciplinary	Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991)
	Posner	Doctrinal/Survey	John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987)
	Posner	Doctrinal/Survey	Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976)
	Posner	Empirical	Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529 (2004)
Frey v. EPA, 751 F.3d 461 (7th Cir. 2014)	Hamilton	Recent Supreme Court	Lucia A. Silecchia, *The Catalyst Calamity: Post-*Buckhannon *Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1 (2004)
Goldberg v. 401 N.	Posner	Recent Supreme Court	Jennifer L. Mnookin, *Expert*

Wabash Venture LLC, 755 F.3d 456 (7th Cir. 2014)			*Evidence and the Confrontation Clause After* Crawford v. Washington, 15 BROOK. J.L. & POL'Y 791 (2007)
	Posner	Doctrinal/ Narrow Issue	David L. Faigman, *Expert Evidence in Flatland: The Geometry of a World Without Scientific Culture*, 34 SETON HALL L. REV. 255 (2003)
	Posner	Theory/ Interdisciplinary	John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006)
Grede v. FCStone, LLC, 746 F.3d 244 (7th Cir. 2014)	Hamilton	Legislative History/Critique	Peter S. Kim, *Navigating the Safe Harbors: Two Bright Line Rules To Assist Courts in Applying the Stockbroker Defense and the Good Faith Defense*, 2008 COLUM. BUS. L. REV. 657
Halperin v. Halperin, 750 F.3d 668 (7th Cir. 2014)	Posner	Doctrinal/Survey	Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271 (1986)
Hayden v. Greensburg Cmty. Sch. Corp., 743 F.3d 569 (7th Cir. 2014)	Rovner	Doctrinal/ Narrow Issue	Jeremiah R. Newhall, *Sex-Based Dress Codes and Equal Protection in Public Schools*, 12 APPALACHIAN J.L. 209 (2013)
	Rovner	Doctrinal/ Narrow Issue	Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-VMI To Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. DAVIS J. JUV. L. & POL'Y 281 (2009)
Heartland Human Servs. v. NLRB, 746 F.3d 802 (7th Cir. 2014)	Posner	Doctrinal/ Narrow Issue	Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 GEO. WASH. L. REV. 262 (1987)
	Posner	Doctrinal/ Narrow Issue	M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004)
In re Miss. Valley Livestock, Inc., 745 F.3d 299 (7th Cir. 2014)	Wood	Doctrinal/ Narrow Issue	Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265 (1998)
	Wood	Doctrinal/ Narrow Issue	Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297.

Kingsley v. Hendrickson, 744 F.3d 443, (7th Cir. 2014)	Hamilton (dissenting)	Doctrinal/ Narrow Issue	Karen M. Blum & John J. Ryan, *Recent Developments in the Use of Excessive Force by Law Enforcement*, 24 TOURO L. REV. 569 (2008)
	Hamilton (dissenting)	Doctrinal/ Narrow Issue	Irene M. Baker, Wilson v. Spain*: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?*, 75 ST. JOHN'S L. REV. 449 (2001)
Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496 (7th Cir. 2014)	Posner	Comparative	Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 57 (1994)
	Posner	Doctrinal/ Narrow Issue	Leslie A. Kurtz, *The Methuselah Factor: When Characters Outlive Their Copyrights*, 11 U. MIAMI ENT. & SPORTS L. REV. 437 (1994)
Klinger v. Conan Doyle Estate, Ltd., 761 F.3d 789 (7th Cir. 2014)	Posner	Doctrinal/ Narrow Issue	Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509 (2003)
	Posner	Doctrinal/ Narrow Issue	Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319 (2013)
Laborers Local 236 v. Walker, 749 F.3d 628 (7th Cir. 2014)	Flaum	Theory/ Interdisciplinary	Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 34 COMP. LAB. L. & POL'Y J. 277 (2013)
Lightspeed Media Corp. v. Smith, 761 F.3d 699 (7th Cir. 2014)	Wood	Legislative History/Critique	Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561 (2010)
Markadonatos v. Village of Woodbridge, 760 F.3d 545 (7th Cir. 2014)	Posner (concurring)	Doctrinal/Survey	Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2008)
	Hamilton (dissenting)	Doctrinal/Survey	Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401 (2002)

	Hamilton (dissenting)	Doctrinal/Survey	Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983)
	Hamilton (dissenting)	Doctrinal/ Narrow Issue	Michael L. Eber, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207 (2008)
Michigan v. U.S. Army Corps of Eng'rs, 758 F.3d 892 (7th Cir. 2014)	Wood	Doctrinal/Survey	Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964)
	Wood	Doctrinal/Survey	William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966)
	Wood	Doctrinal/Survey	David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013)
N.L.A. v. Holder, 744 F.3d 425 (7th Cir. 2014)	Rovner	Theory/ Interdisciplinary	Luz E. Nagle, *Colombian Asylum Seekers and What Practitioners Should Know About the Colombian Crisis*, 18 GEO. IMMIGR. L.J. 441 (2004)
	Rovner	Theory/ Interdisciplinary	United Nations High Comm'r for Refugees, *International Protection Considerations Regarding Colombian Asylum Seekers*, 15 INT'L J. REFUGEE L. 318 (2003)
Parmalat Capital Fin. Ltd. v. Grant Thornton Int'l, 756 F.3d 549 (7th Cir. 2014)	Posner	Doctrinal/Survey	David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317 (1977)
	Posner	Doctrinal/Survey	Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928)
	Posner	Doctrinal/ Narrow Issue	Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675 (1985)
Pennington v. ZionSolutions LLC, 742 F.3d 715 (7th Cir. 2014)	Posner	Doctrinal/ Narrow Issue	Note, *Creditor's Liability for Mismanagement of Debtor Corporation*, 47 YALE L.J. 1009 (1938)
Shields v. Ill. Dep't of Corr., 746 F.3d 782	Hamilton	Doctrinal/Survey	Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627 (1999)

(7th Cir. 2014)	Hamilton	Doctrinal/Survey	Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753 (1989)
	Hamilton	Theory/ Interdisciplinary	Larry Kramer & Alan O. Sykes, *Municipal Liability Under Section 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249
	Hamilton	Doctrinal/Survey	Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517 (1987)
	Hamilton	Doctrinal/Survey	Karen M. Blum, *From* Monroe *to* Monell*: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409 (1978)
	Hamilton	Theory/ Interdisciplinary	Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989)
	Hamilton	Doctrinal/ Narrow Issue	Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449 (2009)
	Hamilton	Doctrinal/ Narrow Issue	Barbara Kritchevsky, *Civil Rights Liability of Private Entities*, 26 CARDOZO L. REV. 35 (2004)
	Hamilton	Doctrinal/ Narrow Issue	Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9 (2004)
Suesz v. Med-1 Solutions, LLC, 757 F.3d 636 (7th Cir. 2014)	Sykes (concurring)	Doctrinal/Survey	Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001)
	Sykes (concurring)	Doctrinal/Survey	Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1 (1999)
	Hamilton/ Posner	Doctrinal/Survey	Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994)

	Rovner	Doctrinal/ Narrow Issue	Megan Pauline Marinos, Comment, *Breaking and Entering or Community Caretaking? A Solution to the Overbroad Expansion of the Inventory Search*, 22 GEO. MASON U. C.R. L.J. 249 (2012)
	Rovner	Doctrinal/ Narrow Issue	Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485 (2009)
	Rovner	Doctrinal/ Narrow Issue	Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801 (2007)
	Rovner	Doctrinal/ Narrow Issue	Mary Elizabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325 (1999)
Sutterfield v. City of Milwaukee, 751 F.3d 542 (7th Cir. 2014)	Rovner	Doctrinal/ Narrow Issue	Gregory T. Helding, Comment, *Stop Hammering Fourth Amendment Rights: Reshaping the Community Caretaking Exception With the Physical Intrusion Standard*, 97 MARQ. L. REV. 123 (2013)
	Rovner	Doctrinal/ Narrow Issue	Debra Livingston, Police, *Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261
	Rovner	Doctrinal/ Narrow Issue	John L. Schwab & Thomas G. Sprankling, *Houston, We Have a Problem: Does the Second Amendment Create a Property Right to a Specific Firearm?*, 112 COLUM. L. REV. SIDEBAR 158 (2012), http://columbialawreview.org/houston-we-have-a-problem-2 [http://perma.cc/MPX6-7HP3]
	Manion (concurring)	Legislative History/Critique	Jana R. McCreary, *"Mentally Defective" Language in the Gun Control Act*, 45 CONN. L. REV. 813 (2013)
United States v. Adkins, 743 F.3d 176 (7th Cir. 2014)	Flaum	Doctrinal/ Narrow Issue	Laura A. Napoli, *Demystifying "Pornography": Tailoring Special Release Conditions Concerning Pornography and Sexually Oriented Expression*, 11 U.N.H. L. REV. 69 (2013)

United States v. Boyce, 742 F.3d 792 (7th Cir. 2014)	Posner (concurring)	Doctrinal/ Narrow Issue	Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907 (2001)
	Posner (concurring)	Doctrinal/ Narrow Issue	Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331 (2012)
	Posner (concurring)	Doctrinal/ Narrow Issue	Jon. R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869 (1981)
	Posner (concurring)	Theory/ Interdisciplinary	I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1
	Posner (concurring)	Doctrinal/ Narrow Issue	Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432 (1928)
United States v. Farano, 749 F.3d 658 (7th Cir. 2014)	Posner	Doctrinal/ Narrow Issue	Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49 (1997)
	Posner	Doctrinal/Survey	Note, *Developments in the Law—III. Jury Selection and Composition*, 110 HARV. L. REV. 1443 (1997)
	Posner	Doctrinal/Survey	Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992)
United States v. Hernandez, 751 F.3d 538 (7th Cir. 2014)	Manion	Doctrinal/ Narrow Issue	Rorie A. Norton, Note, *Matters of Public Safety and the Current Quarrel over the Scope of the Quarles Exception to* Miranda, 78 FORDHAM L. REV. 1931 (2010)
United States v. McGill, 754 F.3d 452 (7th Cir. 2014)	Rovner	Doctrinal/ Narrow Issue	Maggie Muething, Note, *Inactive Distribution: How the Federal Sentencing Guidelines for Distribution of Child Pornography Fail To Effectively Account for Peer-to-Peer Networks*, 73 OHIO ST. L.J. 1485 (2012)
United States v. Thomas, 763 F.3d 689	Wood	Doctrinal/ Narrow Issue	Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness*

(7th Cir. 2014)			*Testimony*, 2006 FED. CTS. L. REV. 3
United States v. Williams, 739 F.3d 1064 (7th Cir. 2014)	Posner	Theory/ Interdisciplinary	Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33 (2011)
Univ. of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir. 2014)	Flaum (dissenting)	Recent Supreme Court	Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990)
Velásquez-García v. Holder, 760 F.3d 571 (7th Cir. 2014)	Wood	Doctrinal/Survey	Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000)
Abbott v. Lockheed Martin Corp., 725 F.3d 803 (7th Cir. 2013)	Wood	Doctrinal/ Narrow Issue	Paul J. Donahue, *Plan Sponsor Fiduciary Duty for the Selection of Options in Participant-Directed Defined Contribution Plans and the Choice Between Stable Value and Money Market*, 39 AKRON L. REV. 9 (2006)
Balthazar v. City of Chicago, 735 F.3d 634 (7th Cir. 2013)	Posner	Doctrinal/ Narrow Issue	Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701 (2000)
Baugh v. Cuprum S.A. de C.V., 730 F.3d 801 (7th Cir. 2013)	Hamilton	Doctrinal/ Narrow Issue	Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 U.C. DAVIS. L. REV. 957 (1992)
Carajeski v. Zoeller, 735 F.3d 577 (7th Cir. 2013)	Posner	Legislative History/Critique	Note, *The Unclaimed Personal Property Problem: A Legislative Proposal*, 19 STAN. L. REV. 619 (1967)
Currie v. Chhabra, 728 F.3d 626 (7th Cir. 2013)	Wood	Doctrinal/ Narrow Issue	Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PENN. L. REV. 1009 (2013)
DeKalb Cnty. v. Fed. Housing Fin. Agency, 741 F.3d 795 (7th Cir. 2013)	Posner	Doctrinal/ Narrow Issue	Richard Scott Carnell, *Handling the Failure of a Government-Sponsored Enterprise*, 80 WASH. L. REV. 565 (2005)
	Posner	Doctrinal/ Narrow Issue	Erik M. Jensen, *The Apportionment of 'Direct Taxes': Are Consumption Taxes*

			Constitutional?, 97 COLUM. L. REV. 2334 (1997)
	Posner	Theory/ Interdisciplinary	H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958)
E.E.O.C. v. Mach Mining LLC, 738 F.3d 171 (7th Cir. 2013)	Hamilton	Doctrinal/Survey	Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993)
Garcia v. Colvin, 741 F.3d 758 (7th Cir. 2013)	Posner	Doctrinal/ Narrow Issue	George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575 (1997)
Goesel v. Boley Int'l (H.K.) Ltd., 738 F.3d 831 (7th Cir. 2013)	Posner	Doctrinal/ Narrow Issue	Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883 (2004)
	Posner	Theory/ Interdisciplinary	Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867 (2007)
	Posner	Doctrinal/Narrow Issue	Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957 (2010)
	Posner	Theory/ Interdisciplinary	Alison Lothes, Note, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433 (2005)
	Posner	Doctrinal/ Narrow Issue	Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991)
Hanson v. Beth, 738 F.3d 158 (7th Cir. 2013)	Flaum	Doctrinal/ Narrow Issue	H. Richard Uviller, *Evidence of Character To Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PENN. L. REV. 845 (1982)
Healix Infusion Therapy v. Heartland Home Infusions, 733 F.3d 700 (7th Cir. 2013)	Easterbrook	Doctrinal/Survey	Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175 (1983)
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